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ABSTRACT

The Multiethnic Placement Act and its 1996 amendment sought to reduce the time children wait to be adopted by eliminating race-related barriers to placement. This report provides information on federal, state, and local efforts to implement the act and its amendment in foster care and adoption placement policy, guidance, and technical assistance; and barriers to changing placement practices. Several data collection methods were used, including interviews with foster care and adoption program officials at the Department of Health and Human Services (HHS), the California Department of Social Services, and caseworkers in two California counties; review of relevant laws, regulations, and documents; and review of selected technical assistance activities. The findings indicated that HHS provided less help to states and was slower to revise guidance after the 1996 amendments than in 1994. Both California counties have trained caseworkers on the amendment. Among the challenges remaining at all government levels are changing long-standing placement practices, translating legal principles into practical advice, and developing compliance monitoring systems. Implementing the amended act predominantly relies on caseworkers' understanding and willingness to eliminate race from placement decisions; however, not all believe that eliminating race considerations will result in the best placements for children. Neither the state nor HHS has provided clear guidance in applying the law to casework. Federal efforts to determine whether placement decisions are consistent with the amended act will be hampered by difficulties in obtaining complete and sufficient data. Seven appendices include the HHS communications regarding the legislation's provisions. (KB)

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United States General Accounting Office

GAO

Report to the Chairman, Subcommittee on Human Resources, Committee on Ways and Means, House of Representatives

September 1998

FOSTER CARE

Implementation of the Multiethnic Placement Act Poses Difficult Challenges

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United States
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Washington, D.C. 20548

Health, Education, and
Human Services Division

B-279242

September 14, 1998

The Honorable E. Clay Shaw, Jr.
Chairman, Subcommittee on Human Resources
Committee on Ways and Means
House of Representatives

Dear Mr. Chairman:

At least one-third of the estimated 500,000 children currently in foster care will never return to their birth parents, leaving those children in need of permanent homes. Certain groups of foster children have waited longer than others to belong to a new family. Minority children—who made up over 60 percent of those in foster care nationwide in 1994—waited twice as long for permanent homes as did other foster children. The delay in placing minority children may have been due in part to the common practice of matching the race of a child with that of a parent in foster care and public agency adoption placements—a practice that was customary and required in many areas for the last 20 years. Yet, the pool of available foster and adoptive parents contained fewer minority parents than there were minority children needing homes. The Multiethnic Placement Act of 1994, as amended by the interethnic adoption provisions in 1996, sought to decrease the length of time that children wait to be adopted by eliminating race-related barriers to placement in permanent homes. The 1996 amendment strengthened the prohibition on the use of race. Whereas the original act explicitly permitted race to be considered as one of a number of factors when making a placement, the 1996 amendment removed that provision, thus making it clear that race could not even be one of a group of reasons routinely used when making placement decisions. This law puts child welfare agencies on notice that they are subject to existing civil rights principles banning racial discrimination when making foster care or adoption placement decisions. Thus, agencies can no longer routinely assume that placing children with parents of the same race is in the best interests of a child or that same-race parents are more capable of passing on a cultural heritage than parents of a different race.

You asked for information about implementation of the Multiethnic Placement Act of 1994, as amended, at the federal level and in states with large and ethnically diverse foster care caseloads. Specifically, we are providing information on (1) efforts by federal, state, and local agencies to implement the 1994 act in the areas of foster care and adoption placement policy and guidance, and technical assistance; (2) efforts by federal, state,

and local agencies in these same areas to implement the 1996 amendment to the act; and (3) the challenges all levels of government face to change placement practices.

To develop this information, we interviewed foster care and adoption program officials at the Department of Health and Human Services (HHS), the California Department of Social Services, and two California counties with large foster care populations—Alameda and San Diego. We selected California for review because it has the largest foster care population in the nation and minority children made up 64 percent of its foster care caseload as of September 30, 1996. Minority children compose 79 percent and 56 percent, respectively, of the foster care populations in the two counties we visited. We reviewed laws, regulations, and documents relevant to foster care and adoption policies, guidance, procedures, training, and technical assistance. We also reviewed selected activities of federal contractors operating National Resource Centers who are responsible for providing technical assistance on child welfare issues to states, and federal grantees' proposed activities under the Adoption Opportunities Grants program. In addition, we examined the use of an HHS database—the Adoption and Foster Care Analysis and Reporting System (AFCARS)—to monitor the implementation of the amended act. We also met with 25 county caseworkers to discuss the processes they use to make placement decisions and their knowledge of the amended act. Finally, we reviewed articles published in law and child welfare journals and interviewed researchers and practitioners interested in the implementation of this law. We conducted our review from January 1998 to July 1998 in accordance with generally accepted government auditing standards.

Results in Brief

HHS and the state of California initiated collaborative, multipronged efforts to inform agencies and caseworkers about the Multiethnic Placement Act of 1994. HHS program officials recognized that the act requires child welfare agencies to undergo a historic change in how foster care and adoption placement decisions are made by limiting the use of race as a factor. Within 6 weeks of the act's passage, HHS took the first step in a comprehensive approach to implementation that involved issuing policy guidance and providing technical assistance, including training state officials and working with them to ensure that state laws conformed to the new federal legislation. However, some states believed that HHS' policy was more restrictive regarding the use of race in placement decisions than provided for in the act. For its part, the state of California issued a

memorandum to alert its counties to the new act, revised its adoption regulations, and collaborated with county child welfare officials to develop a strategy to implement the act. In the two counties we visited, the foster care and adoption units trained caseworkers on the provisions of the act.

Unlike its efforts after the 1994 act, when the 1996 amendment was enacted, HHS provided less help to the states and was slower to revise its guidance to them. After enactment of the 1996 amendment, HHS did not update its policy guidance for 9 months, and it has done little to address casework practice issues—a step necessary for successful implementation. HHS was less proactive after passage of the amendment in 1996 than it had been in 1994 because agency officials believed that the amendment affirmed HHS' interpretation of the 1994 act. That is, its original guidance was consistent with the statutory and constitutional civil rights principles that are the foundation of both the act and the amendment. California has yet to conform its state laws and regulations to the amended act. The state provided training to some county staff, but the training was not targeted toward staff who have primary responsibility for placing children in foster or adoptive homes. Of the two counties we reviewed, the adoption unit in one county has begun to revise its policies, but the other units have not done so. Both counties have provided some training to caseworkers on the 1996 amendment, either through formal training sessions or one-on-one training by supervisors.

Changing long-standing social work practices, translating legal principles into practical advice for caseworkers, and developing compliance monitoring systems are among the challenges remaining for officials at all levels of government in changing placement decision-making. The implementation of this amended act predominantly relies on the understanding and willingness of individual caseworkers to eliminate a historically important factor—race—from the placement decisions they make. While agency officials and caseworkers understand that this legislation prohibits them from delaying or denying placements on the basis of race, not all believe that eliminating race will result in placements that are in the best interests of children, which is a basic criterion for placement decisions. In addition, state and local officials and caseworkers demonstrated lingering confusion about allowable actions under the law. The state training sessions we attended on the amended act, in which presenters offered contradictory views of allowable activities, showed that neither the state nor HHS has provided clear guidance to caseworkers to apply the law to casework practice. Finally, federal efforts to determine

whether placement decisions are consistent with the amended act's restrictions on the use of race-based factors will be hampered by difficulties in identifying data that are complete and sufficient.

Background

The Howard M. Metzenbaum Multiethnic Placement Act of 1994 is one of several recent congressional initiatives to address concerns that children remain in foster care too long.[1] As originally enacted, the law provided that the placement of children in foster or adoptive homes could not be denied or delayed solely because of the race, color, or national origin of the child or of the prospective foster or adoptive parents. However, the act expressly permitted consideration of the racial, ethnic, or cultural background of the child and the capacity of prospective parents to meet the child's needs in these areas when making placement decisions—if such a consideration was one of a number of factors used to determine the best interests of a child. Furthermore, it required states to undertake efforts to recruit foster and adoptive families that reflect the racial and ethnic diversity of children in need of care.

The 1996 amendment clarified that race, color, or national origin may be considered only in rare circumstances when making placement decisions.[2] As amended, the act states that placement cannot be denied or delayed because of race, color, or national origin. Furthermore, the amendment removed language that allowed routine consideration of these factors in assessing both the best interests of the child and the capacity of prospective foster or adoptive parents to meet the needs of a child. An agency making a placement decision that uses race, color, or national origin would need to prove to the courts that the decision was justified by a compelling government interest and necessary to the accomplishment of a legitimate state purpose—in this case, the best interests of a child. Thus, under the law, the "best interests of a child" is defined on a narrow, case-specific basis, whereas child welfare agencies have historically assumed that same-race placements are in the best interests of all children. The amendment also added an enforcement provision that penalizes states that violate the amended act. The penalties range from 2 percent to 5 percent of the federal title IV-E funds the state would have received, depending upon whether the violation is the first or a subsequent one in the fiscal year. HHS estimates that the maximum penalty for a state with a large foster care population could be as high as $10 million in one year. Any agency, private or public, is subject to the provisions of the

[1]P.L. 103-382, secs. 551-553, 108 stat. 3518, 4056-57. See app. I for the text of the law.

[2]P.L. 104-188, sec. 1808, 110 stat. 1755, 1903-04. See app. II for the text of the amendment.

amended act if it receives federal funds. Agencies that receive funds indirectly, as a subrecipient of another agency, must also comply with the act. Such funds include but are not limited to foster care funds for programs under title IV-E of the Social Security Act, block grant funds, and discretionary grants.

Before placements can be made, a child welfare agency must have an available pool of prospective foster and adoptive parents. In order to become foster or adoptive parents in California, applicants undergo a process that requires them to open all aspects of their home and personal life to scrutiny. Typically, these prospective parents attend an orientation and are fingerprinted and interviewed. They then attend mandatory training that can last up to 10 weeks. If they meet the minimum qualifications—such as a background free from certain types of criminal convictions—their personal life is then reviewed in detail by caseworkers.[3] This review is called a homestudy. According to one county, 20 percent or fewer applicants reach this milestone. A homestudy addresses the financial situation, current and previous relationships, and life experiences of the applicant. It also addresses the abilities and desires of the applicant to parent certain types of children—including children of particular races—and other issues. Only when the homestudy process is completed, a written report of its findings approved by a child welfare agency, and the home found to meet safety standards is an applicant approved as a foster or adoptive parent. Caseworkers may then consider whether a prospective foster or adoptive parent would be an appropriate caregiver for a particular foster child.

Social work practice uses the best interests of the child as its guiding principle in placement decisions. Caseworkers exercise professional judgment to balance the many factors that historically have been included when defining that principle. When considering what is in the best interests of the child, both physical and emotional well-being factors such as the safety, security, stability, nurturance, and permanence for the child are taken into consideration. In social work practice, the need for security and stability has included maintaining cultural heritage. The caseworker's placement decision may also be affected by the administrative procedures used in an agency, the size of the pool of potential foster and adoptive parents, and, in some cases, individual caseworkers' beliefs. An agency may have a centralized system for providing caseworkers with information on available homes, or it may be left to the caseworker to seek out an

[3]Kinship caregivers—the relatives of biological parents—may undergo an abbreviated process. For example, they may not be required to attend orientation or training.

available foster home. Depending on the size of the pool of potential foster or adoptive parents and the needs of the child, a caseworker may have few or many homes to consider when making a placement decision. In any case, good casework practice includes making individualized, needs-based placements reflecting the best interests of a child.

While the thrust of the act, as amended, is toward race-blind foster care and adoption placement decisions, other federal policies that guide placement decisions inherently tend toward placing children with parents of the same race. The Indian Child Welfare Act of 1978 grants Native American tribes exclusive jurisdiction over specific Native American child welfare issues. The Multiethnic Placement Act does not affect the application of tribal jurisdiction. Section 505 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 amended section 471(a) of the Social Security Act to require states to consider giving priority to relatives of foster children when making placement decisions. Some states, such as California, require that caseworkers first try to place a child with relatives—known as kinship caregivers—before considering other types of placement. Consequently, the Multiethnic Placement Act affects about one-half of the California foster care caseload—those foster and adoptive children who are not under tribal jurisdiction or cared for by relatives.

The 1994 Act Launched Efforts to End Discriminatory Placement Activities

HHS, the state of California, and foster care and adoption agencies in the two counties we reviewed took actions to inform agencies and caseworkers about the passage of the 1994 act. HHS also provided technical assistance to states, including working with states to ensure that state laws were consistent with the act. California changed state law and regulations, and the two counties we reviewed also changed policies to conform to the new law. In addition, the two counties provided training on the act to caseworkers responsible for making placement decisions.

HHS Implementation Efforts

HHS recognized the significance of the change in casework practice that the 1994 law would require of child welfare agencies by restricting the use of race in placement decisions. In response, HHS launched a major effort to provide policy guidance and technical assistance.

The underpinning for HHS' actions was coordination among its units that do not customarily issue joint policies—such as the Children's Bureau and the Office for Civil Rights—to ensure that the agency provided consistent

guidance. These two units have the responsibility within HHS for implementing the act. The Children's Bureau administers programs of federal financial assistance to child welfare agencies and has responsibility for enforcing compliance with the laws authorizing that assistance. The Office for Civil Rights has the responsibility for enforcing compliance with civil rights laws. HHS officials told us that this internal coordination was also essential because the agency itself needed to undergo cultural changes. For example, in order to provide joint guidance, officials in the Office for Civil Rights needed to understand a social work perspective on the role of race in making placement decisions, and officials in the Children's Bureau needed to understand civil rights principles in the context of their programs. Officials told us that they also notified agency grantees of the act and reviewed selected documents to see that they were consistent with it.[4]

Within 6 weeks of enactment of the new law, HHS issued a memorandum to states that summarized the act and provided its text. About 5 months later—and 6 months before the act went into effect—HHS issued its policy guidance. (See app. III for the text of the guidance.) The guidance, jointly issued by the Children's Bureau and the Office for Civil Rights, was based on legal principles in title VI of the Civil Rights Act of 1964. The guidance introduced key legal concepts and identified certain illegal practices, such as the use of a time period during which a search would occur only for foster or adoptive parents of the same race as the foster child. Some states believed that HHS' guidance regarding the use of race in placement decisions was more restrictive than provided for in the act. However, HHS maintained that its guidance accurately reflected the statutory and constitutional civil rights principles involved. To assist states in understanding what they must do to comply with the act, officials from the Children's Bureau and the Office for Civil Rights jointly provided training to state officials and discussed the new law with state child welfare directors in at least 10 states. In addition, HHS contracted with a National Resource Center for a monograph on the new law; the monograph was released at the time the act went into effect and provided additional guidance for states' use when implementing the act. Finally, HHS made other information and resources available to states from its contracted Resource Centers, including assistance to individual states.

[4]We reviewed summaries of grants awarded in 1997 under the Adoption Opportunities Grants program to determine whether that program is consistent with the act. The request for proposals included information about compliance with the act. Of the 20 summaries we reviewed, all but one grantee appeared to conduct programs that were consistent with the intent of the act.

To ensure that state laws were consistent with the act, the Office for Civil Rights reviewed each state's statutes, regulations, and policies. It then worked with states whose laws did not conform to initiate corrective action. The review found that the statutes, rules, or policies of 28 states and the District of Columbia did not conform. All of them completed changes to comply with the 1994 law. Furthermore, as part of its ongoing efforts to determine whether agency policies and caseworker actions comply with civil rights law, including the act, the Office for Civil Rights continued to investigate complaints of discrimination that were filed with the agency. Past complaints have consisted, for example, of charges brought by foster parents who were not allowed to adopt a child who had been in their care; the denial of the opportunity to adopt the child was allegedly because the child was of a different race than the foster parents.

California Implementation Efforts

Implementation of the 1994 act required changes to law and regulations at the state level and to policies at the county level. The state of California began its implementation efforts in August 1995 by issuing an informational memorandum to alert counties to the act before it went into effect.[5] In addition, state officials began a collaborative effort with an association of county child welfare officials to devise an implementation strategy. The state also began the process of amending its state law to comply with the federal statute. When amended, the state law eliminated a discriminatory requirement that same-race placements be sought for 90 days before transracial placements could be made. The state also revised its adoption regulations after the state law was passed. State officials told us that it was not necessary to revise the foster care regulations because they were already consistent with the act. Although the change in state law eliminated the requirement to seek same-race placements, that provision had not previously been included in the foster care regulations. In addition, state officials believe that the act focused primarily on adoption issues. Thus, adoption regulations required revision, whereas foster care regulations did not. In the counties we reviewed, one county finished revision of its foster care and adoption policies in February 1996. The other county issued a memorandum to its staff in January 1996 to alert them to the new law. However, that county has not formally revised its foster care or adoption policies in over 20 years, according to one county official.

[5]Because California's state law would not be in conformance with the act until January 1, 1996, HHS extended the date by which California was to comply with the act, postponing the deadline from October 21, 1995, to January 1, 1996.

The state and counties planned training on the 1994 law, but only the counties actually conducted any. The state planned to roll out training, but suspended the planned training when the act was amended in August 1996. State officials told us that they needed to revise the training to reflect the amendment. The two counties, however, developed their own training programs by relying on information they obtained from the county child welfare association. In both counties, supervisors in the adoption unit took the lead in developing and presenting one-time training sessions to foster care and adoption caseworkers. Most, if not all, foster care and adoption caseworkers in the two counties received training. Both counties also incorporated training on the 1994 act into their curriculums for new caseworkers.

HHS and California Were Slow to Respond to the 1996 Amendment

Following amendment of the act, HHS was slower to revise its policy guidance and provided less technical assistance to states than it did after the passage of the 1994 act. While California informed its counties of the change in federal law, it did not do so until 3 months after HHS issued its policy guidance on the amended act. Although HHS did not repeat its technical assistance effort to assist states in understanding the amended law, the state and counties we reviewed provided some training on the amended act to staff.

HHS Policy on the 1996 Amendment Reiterates Civil Rights Focus

HHS did not notify states of the change in the law until 3 months after its passage and did not issue policy guidance on the amendment until 6 months after the notification. (See app. IV for the text of the guidance.) As was the case with the policy guidance on the original act, HHS' revised guidance was issued jointly by the Children's Bureau and the Office for Civil Rights. The policy guidance noted changes in the language of the law, such as the elimination of the provision that explicitly permitted race to be considered as one of a number of factors. The guidance also described the penalties for violating the amended act and emphasized civil rights principles and key legal concepts that were included in the earlier guidance on the original act. The new guidance expressed HHS' view that the amended act was consistent with the constitutional and civil rights principles that HHS used in preparing its original guidance. However, it was not until May 1998, when we submitted a set of questions based on concerns that county officials and caseworkers raised with us, that HHS issued guidance answering practical questions about changes in social work practice needed to make casework consistent with the amended act. (See app. V for a list of the questions and answers.) The guidance on social

work practice issues clarified, for example, that public agencies cannot use race to differentiate between otherwise acceptable foster placements even if such a consideration does not delay or deny a child's placement. The agency did not repeat the joint outreach and training to state officials that it provided for the 1994 act. While the technical assistance provided by the Resource Centers is ongoing, the monograph on the act has not yet been updated to reflect the amendment.

The Office for Civil Rights took several actions to ensure that state actions were consistent with the amended act. It addressed case-by-case complaints of violations and, in 1997, began reviews in selected locations. Officials told us that it was not necessary to conduct another comprehensive review of state statutes because they said they would work with states on a case-by-case basis. In addition, officials explored the use of AFCARS to monitor foster care and adoption placements. HHS officials who work with AFCARS confirmed that neither the historical data needed to determine placement patterns related to race that may have existed before the 1994 act's effective date nor the current information on most states' foster children—including California's—was sufficiently complete or adequate to allow its consideration in determining whether placement decisions included use of race-based criteria.

State and County Implementation Activities for the 1996 Amendment Under Way but Incomplete

Passage of the amendment in 1996 again required changes in state law, regulations, and policy. A bill was introduced in the California legislature in February 1998 to make California State law consistent with the federal amendment. The bill originally contained language to delete a nonconforming provision in state law that explicitly allows consideration of race as one of a number of factors in a placement decision. However, state officials told us the bill has been stalled in the legislative process and its passage is uncertain. Although federal law takes precedence over state law when such situations arise, an HHS Office for Civil Rights official told us that HHS encourages states to pass conforming legislation. Furthermore, state officials told us that state regulations on adoption and foster care placement cannot be changed until this bill becomes law. Therefore, California regulations continue to reflect only the 1994 law. In September 1997, the state notified its counties of the amendment to the act. Although counties can change their own policies without state actions, in the two counties we visited, only one has begun that process: in that county, the adoption unit has begun to update its regulations, but the foster care unit has not done so.

Despite the lack of a change in state law, the state resumed its training activities in February 1998, when it offered its first training seminar on the amended act. A limited number of county workers in the southern portion of the state attended that seminar, which included 3 hours of training. The state held two additional training sessions in the state and plans to include training on the amended act at two other seminars. To date, the state has targeted the training to licensing and recruitment staff—who work with potential foster and adoptive parents—and not to caseworkers or supervisors who place children in foster and adoptive homes. But it is these latter staff who are most directly responsible for placement decisions and thus for complying with the amended act's provisions. Finally, one of the two counties we visited is now developing written training material to reflect the 1996 amendment and has provided formal training on it to some workers. The other county charged its supervisors with training their staff one-on-one.

HHS and the State Face Continuing Implementation Challenges

Officials at all levels of government face a diverse set of challenges as they continue to implement the amended act. Major issues that remain include changing caseworkers' and practitioners' beliefs about the importance of race-based placement decisions, developing a shared understanding at all levels of government about allowable placement practices, and developing an effective federal compliance monitoring system.

The Act's Removal of Race From Placement Decisions Not Consistent With Long-Standing Social Work Practice and Some Caseworkers' Beliefs

The belief that race or cultural heritage is central to a child's best interests when making a placement is so inherent in social work theory and practice that a policy statement of the National Association of Social Workers still reflects this tenet, despite changes in the federal law. Matching the race of a child and parent in foster care placements and public agency adoptions was customary and required in many areas for the last 20 years. The practice was based on the belief that children who are removed from their homes will adapt to their changed circumstances more successfully if they resemble their foster or adoptive families and if they maintain ties to their cultural heritage. In this context, the childrens' needs were often considered more compelling than the rights of adults to foster or adopt children. One state official made this point directly, stating that her purpose is to find families for children, not children for prospective parents.

Officials' and caseworkers' personal acceptance of the value of the act and the 1996 amendment varies. Some told us that they welcomed the removal

of routine race-matching from the child welfare definition of best interests of a child and from placement decisions. Those who held this belief said the act and the 1996 amendment made placement decisions easier. Others spoke of the need for children—particularly minority children—always to be placed in homes that will support a child's racial identity. For those individuals, that meant a home with same-race parents. Furthermore, some who value the inclusion of race in placement decisions told us that they do not believe that the past use of race in the decision-making process delayed or denied placements for children.

State and Local Officials Need Information on How to Change Social Work Practice

State program officials in California are struggling to understand the amended act in the context of casework practice issues. They are waiting for the HHS Children's Bureau or the federal National Resource Centers to assist them in making the necessary changes in day-to-day casework practices. In particular, the use of different definitions by caseworkers and attorneys of what constitutes actions in a child's best interests makes application of the act and the amendment to casework practice difficult. State officials characterized the federal policy guidance as "too legalistic." Furthermore, although officials from the Office for Civil Rights have provided training to state officials and continue to be available to conduct training, these state officials do not consider Office for Civil Rights officials capable of providing the desired guidance on how to conduct casework practice consistent with the amended act; as a result, state officials are hesitant to request such guidance from the Office for Civil Rights.

The officials in the two counties we visited said their implementation efforts were hampered by the lack of guidance and information available to them from federal and state sources. The questions on casework practice that we submitted to HHS arose in the course of our discussions with county officials and caseworkers. County officials stressed that they began their implementation efforts with little federal and state technical assistance to help them understand the implications of the act for making foster care and adoption placement decisions; they relied instead on an association of county child welfare officials to obtain the information they needed. Despite the counties' efforts to independently obtain information to proceed with implementation, documents we reviewed in both counties reflected a lack of understanding of the provisions of the amended act. For example, in one county, a draft informational document that was being prepared to inform caseworkers about the amended act included permission for caseworkers to consider the ethnic background of a child

as one of a number of factors in a placement decision, even though the 1996 amendment removed similar wording from federal law. In addition, while the caseworkers we interviewed were aware that the act and the 1996 amendment do not allow denial or delay of placements related to race, color, or national origin, some caseworkers were unsure how and when they are allowed to consider such factors in making placement decisions.

The need for clear guidance on practical casework issues was demonstrated in a state-sponsored training session we attended in February 1998. The training consisted of presentations from four panelists: an attorney from the HHS Office for Civil Rights, an attorney from a National Resource Center, and two representatives from private agencies that recruit minority foster and adoptive parents for the state of California. While the panelists' presentations noted that placements could not be denied or delayed for race-based reasons, they offered contradictory views of permissible activities under the law. For example, the panelists were asked if race could be used to choose a placement when two available families are equally suitable to meet the needs of a child but one family is of the same race as the child. The attorney from the Office for Civil Rights advised that race could not be used as the determining factor in that example, whereas the attorney from the Resource Center said that a case could be made for considering race in that circumstance. The state has since modified the training session to provide a more consistent presentation. However, the paucity of practical guidance contributes to continued uncertainty about allowable actions under the amended act. For example, although the act and the 1996 amendment apply equally to foster and adoption placements, some state and county officials told us that they believe it applies primarily to adoption placements.

Development of a Compliance Monitoring System Hampered by Lack of Data and Documentation

Federal officials will need to seek new ways to identify appropriate data and documentation that will allow them to effectively determine whether placement decisions conform to the provisions of the amended act.

Federal AFCARS information is the primary source of federal administrative data about foster care and adoption. It allows HHS to perform research on and evaluate state foster care and adoption programs, and it assists HHS in targeting technical assistance efforts, among other uses. However, AFCARS data are not sufficient to determine placement patterns related to race that may have existed before the 1994 act's effective date. Our examination of AFCARS indicated that the future use of this database for monitoring

changes in placement patterns directly related to the amended act is unlikely. For example, the database lacks sufficient information on the racial identity of foster and adoptive children and their foster parents to conduct the type of detailed analysis of foster care and adoption patterns that would likely be needed to identify discriminatory racial patterns.[6]

Analysis of any administrative data will be hampered by difficulties in interpreting the results. Data showing a change in the percentage of same-race placements would not, alone, indicate whether the amended act was effective in restricting race-based placement practices. For example, an increase in the percentage of same-race placements for black foster children could indicate that the amended act is not being followed. Conversely, the same increase could mean that the amended act is being followed but more black foster and adoptive parents are available to care for children because of successful recruitment efforts. If relevant information on changes in the pool of foster and adoptive parents is not available for analysis—as is the case with AFCARS data—then it would not be possible to rule out the success of recruitment efforts as a contributor to an increase in same-race placements.

While case files are another source of information about placement decisions, and such files are used in one type of review periodically performed by HHS, reviewing those files may provide little documentation to assist in determining whether placement decisions are consistent with the amended act's restrictions on the use of race-based factors. In the two counties we visited, the processes caseworkers described for making placement decisions generally lacked a provision for documenting the factors considered, the placement options available, or the reason a particular placement was chosen. Our review of a very limited number of case files in one county, and our experience reading case files for other

[6]AFCARS has three drawbacks to its use as a monitoring tool for the act. First, AFCARS contains limited information on racial identity. In particular, it uses racial categories established by the Bureau of the Census, which lack a biracial category. Without the ability to analyze biracial individuals separately from those of a single race or, at least, to be assured that they are consistently categorized, such racial distinctions are likely to blur results of an analysis. Second, although AFCARS contains racial information on adoptive parents and children, different combinations of variables are available in two separate databases that are not linked to allow matching of the information. For example, the database on adopted children contains the needed racial information, but it also contains information on adopted children who were not in foster care, such as children adopted by stepparents. While it is possible to identify children whose adoption involved a state agency, such a designation may not be sufficient to ensure that only adoptions of foster children are analyzed. Third, general outcome data—such as the average length of time children wait between entry into foster care and termination of parental rights or adoption—will reflect the influence of many initiatives. Among those influences are activities for the President's Adoption 2002 initiative, and the shortened time frames for permanency hearings as mandated by the Adoption and Safe Families Act of 1997. It is unlikely that an analysis of AFCARS data could isolate the effect of a particular initiative on outcomes.

foster care studies, confirmed that it is unlikely the content of placement decisions can be reconstructed from the case files.

Conclusions

The Multiethnic Placement Act, as amended, has been difficult for agencies to implement. Successful implementation requires changing

- state laws, policies, and regulations;
- organizational and personal beliefs in the value of race as a significant factor in making foster and adoptive placements; and
- casework practices so that they incorporate civil rights principles into the definition of a child's best interests.

The federal and state agencies we reviewed began the administrative portion of this task immediately after enactment in 1994. But early prompt action was not sustained after the act was amended. Furthermore, our discussions with California state officials, and our observation of state-sponsored training sessions, suggest that federal policy guidance was not sufficiently practice-oriented to allow caseworkers to understand how to apply the law to the placement decisions they make.

Because foster care and adoption placement decisions are largely dependent upon the actions of individual caseworkers, their willingness to accept a redefinition of what is in the best interests of a child is critical to the successful implementation of this legislation. While some caseworkers welcomed the new law, others frankly discussed with us their concerns about eliminating almost all racial considerations from placement decisions.

HHS and the state of California face the challenge to better explain to practitioners how to integrate social work and legal perspectives on the role of race in making decisions that are in a child's best interests. Because these perspectives are not compatible, tension between them is inevitable. Without a resolution to that tension, full implementation of the amended act may be elusive.

Agency Comments and Our Evaluation

We provided HHS, the state of California, and the two counties in California that we reviewed with the opportunity to comment on a draft of this report. We received comments from HHS, the state of California, and San Diego County.

In commenting on a draft of the report, HHS expanded on two topics addressed in the report: technical assistance, including training; and monitoring for compliance with the act and its amendment. In discussing technical assistance, HHS reiterated its implementation efforts as described in our report, provided information on related actions it has taken in states other than California, and noted that it expects to publish the updated monograph on the amended act in the fall of 1998. In commenting on the challenge of developing a compliance monitoring system, HHS described its pilot efforts to integrate monitoring of compliance with the amended act into its overall monitoring of child welfare outcomes and noted that it expects to publish a notice of its proposed monitoring processes in the Federal Register in October 1998. We agree that an integrated approach to compliance monitoring of child welfare issues could be an effective one. However, because we have not seen HHS' proposal, we cannot assess whether the proposed monitoring will be sufficient to ensure that foster care and adoption placements are consistent with the requirements of the amended act. In this regard, HHS agreed that AFCARS data have limited utility in tracking state compliance with the amended act. HHS also made technical comments, which we incorporated where appropriate. The full text of HHS' comments are contained in appendix VI.

The state of California and San Diego County provided technical comments, which we incorporated where appropriate.

As agreed with your office, we will make no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies of this report to the Secretary of Health and Human Services and program officials in California. We will also make copies available to others on request.

Please contact me on (202) 512-7215 if you or your staff have any questions. Other GAO contacts and staff acknowledgments are listed in appendix VII.

Sincerely yours,

Mark V. Nadel

Mark V. Nadel
Associate Director
Income Security Issues

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Abbreviations

AFCARS	Adoption and Foster Care Analysis and Reporting System
HHS	Department of Health and Human Services

The Howard M. Metzenbaum Multiethnic Placement Act of 1994

PART E—MULTIETHNIC PLACEMENT

Subpart 1—Multiethnic Placement

Howard M. Metzenbaum Multiethnic Placement Act of 1994. Adoption. Foster care. 42 USC 5115a note.

SEC. 551. SHORT TITLE.

This subpart may be cited as the "Howard M. Metzenbaum Multiethnic Placement Act of 1994".

SEC. 552. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) nearly 500,000 children are in foster care in the United States;

(2) tens of thousands of children in foster care are waiting for adoption;

(3) 2 years and 8 months is the median length of time that children wait to be adopted;

(4) child welfare agencies should work to eliminate racial, ethnic, and national origin discrimination and bias in adoption and foster care recruitment, selection, and placement procedures; and

(5) active, creative, and diligent efforts are needed to recruit foster and adoptive parents of every race, ethnicity, and culture in order to facilitate the placement of children in foster and adoptive homes which will best meet each child's needs.

(b) PURPOSE.—It is the purpose of this subpart to promote the best interests of children by—

(1) decreasing the length of time that children wait to be adopted;

(2) preventing discrimination in the placement of children on the basis of race, color, or national origin; and

(3) facilitating the identification and recruitment of foster and adoptive families that can meet children's needs.

42 USC 5115a.

SEC. 553. MULTIETHNIC PLACEMENTS.

(a) ACTIVITIES.—

(1) PROHIBITION.—An agency, or entity, that receives Federal assistance and is involved in adoption or foster care placements may not—

(A) categorically deny to any person the opportunity to become an adoptive or a foster parent, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

(2) PERMISSIBLE CONSIDERATION.—An agency or entity to which paragraph (1) applies may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of a child.

(3) DEFINITION.—As used in this subsection, the term "placement decision" means the decision to place, or to delay or deny the placement of, a child in a foster care or an adoptive home, and includes the decision of the agency or entity involved

to seek the termination of birth parent rights or otherwise make a child legally available for adoptive placement.

(b) EQUITABLE RELIEF.—Any individual who is aggrieved by an action in violation of subsection (a), taken by an agency or entity described in subsection (a), shall have the right to bring an action seeking relief in a United States district court of appropriate jurisdiction.

(c) FEDERAL GUIDANCE.—Not later than 6 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall publish guidance to concerned public and private agencies and entities with respect to compliance with this subpart. Publication

(d) DEADLINE FOR COMPLIANCE.—

(1) IN GENERAL.—Except as provided in paragraph (2), an agency or entity that receives Federal assistance and is involved with adoption or foster care placements shall comply with this subpart not later than six months after publication of the guidance referred to in subsection (c), or one year after the date of enactment of this Act, whichever occurs first.

(2) AUTHORITY TO EXTEND DEADLINE.—If a State demonstrates to the satisfaction of the Secretary that it is necessary to amend State statutory law in order to change a particular practice that is inconsistent with this subpart, the Secretary may extend the compliance date for the State a reasonable number of days after the close of the first State legislative session beginning after the date the guidance referred to in subsection (c) is published.

(e) NONCOMPLIANCE DEEMED A CIVIL RIGHTS VIOLATION.—Noncompliance with this subpart is deemed a violation of title VI of the Civil Rights Act of 1964.

(f) NO EFFECT ON INDIAN CHILD WELFARE ACT OF 1978.—Nothing in this section shall be construed to affect the application of the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.).

SEC. 554. REQUIRED RECRUITMENT EFFORTS FOR CHILD WELFARE SERVICES PROGRAMS.

Section 422(b) of the Social Security Act (42 U.S.C. 622(b)) is amended—

(1) by striking "and" at the end of paragraph (7);

(2) by striking the period at the end of paragraph (8) and inserting "; and"; and

(3) by adding at the end the following:

"(9) provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed.".

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Interethnic Adoption Provisions Amending the Multiethnic Placement Act of 1994

SEC. 1808. REMOVAL OF BARRIERS TO INTERETHNIC ADOPTION.

(a) STATE PLAN REQUIREMENTS.—Section 471(a) of the Social Security Act (42 U.S.C 671(a)) is amended—

(1) by striking "and" at the end of paragraph (16);

(2) by striking the period at the end of paragraph (17) and inserting "; and"; and

(3) by adding at the end the following:

"(18) not later than January 1, 1997, provides that neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may—

"(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or

"(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.".

(b) ENFORCEMENT.—Section 474 of such Act (42 U.S.C. 674) is amended by adding at the end the following:

"(d)(1) If, during any quarter of a fiscal year, a State's program operated under this part is found, as a result of a review conducted under section 1123A, or otherwise, to have violated section 471(a)(18) with respect to a person or to have failed to implement a corrective action plan within a period of time not to exceed 6 months with respect to such violation, then, notwithstanding subsection (a) of this section and any regulations promulgated under section 1123A(b)(3), the Secretary shall reduce the amount otherwise payable to the State under this part, for that fiscal year quarter and for any subsequent quarter of such fiscal year, until the State program is found, as a result of a subsequent review under section 1123A, to have implemented a corrective action plan with respect to such violation, by—

"(A) 2 percent of such otherwise payable amount, in the case of the 1st such finding for the fiscal year with respect to the State;

"(B) 3 percent of such otherwise payable amount, in the case of the 2nd such finding for the fiscal year with respect to the State; or

"(C) 5 percent of such otherwise payable amount, in the case of the 3rd or subsequent such finding for the fiscal year with respect to the State.

In imposing the penalties described in this paragraph, the Secretary shall not reduce any fiscal year payment to a State by more than 5 percent.

"(2) Any other entity which is in a State that receives funds under this part and which violates section 471(a)(18) during a

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fiscal year quarter with respect to any person shall remit to the Secretary all funds that were paid by the State to the entity during the quarter from such funds.

"(3)(A) Any individual who is aggrieved by a violation of section 471(a)(18) by a State or other entity may bring an action seeking relief from the State or other entity in any United States district court.

"(B) An action under this paragraph may not be brought more than 2 years after the date the alleged violation occurred.

"(4) This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.".

42 USC 1996b

(c) CIVIL RIGHTS.—

(1) PROHIBITED CONDUCT.—A person or government that is involved in adoption or foster care placements may not—

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

(2) ENFORCEMENT.—Noncompliance with paragraph (1) is deemed a violation of title VI of the Civil Rights Act of 1964.

(3) NO EFFECT ON THE INDIAN CHILD WELFARE ACT OF 1978.—This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.

(d) CONFORMING AMENDMENT.—Section 553 of the Howard M. Metzenbaum Multiethnic Placement Act of 1994 (42 U.S.C. 5115a) is repealed.

HHS Guidance on the Multiethnic Placement Act of 1994

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office for Civil Rights

Administration for Children and Families

Policy Guidance on the Use of Race, Color or National Origin as Considerations in Adoption and Foster Care Placements

AGENCY: Office for Civil Rights; Administration for Children and Families; HHS

ACTION: Policy Guidance

SUMMARY: The United States Department of Health and Human Services (HHS) is publishing policy guidance on the use of race, color, or national origin as considerations in adoption and foster care placements.

DATES: This guidance is effective immediately.

FOR FURTHER INFORMATION CONTACT: Carol Williams or Dan Lewis (ACF) at 202-205-8618 or Ronald Copeland (OCR) at 202-619-0553; TDD: 1-800-537-7697. Arrangements to receive the policy guidance in an alternative format may be made by contacting the named individuals.

SUPPLEMENTARY INFORMATION:

The Improving America's Schools Act, Pub. L. No. 103-382, 108 Stat. 3518, contains the Multiethnic Placement Act of 1994 (hereinafter referred to as "the Act"). The Act directs the Secretary to publish guidance to concerned public and private agencies and entities with respect to compliance with the Act. Section 553, 108 Stat. 4057 (to be codified at 42 U.S.C. § 5115a). This guidance carries out that direction.

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The policy guidance is designed to assist agencies, which are involved in adoption or foster care placements and which receive Federal assistance, in complying with the Act, the U.S. Constitution and Title VI of the Civil Rights Act of 1964. The guidance provides, consistent with those laws, that an agency or entity that receives Federal financial assistance and is involved in adoption or foster care placements may not discriminate on the basis of the race, color or national origin of the adoptive or foster parent or the child involved. The guidance further specifies that the consideration of race, color, or national origin by agencies making placement determinations is permissible only when an adoption or foster care agency has made a narrowly tailored, individualized determination that the facts and circumstances of a particular case require the consideration of race, color, or national origin in order to advance the best interests of the child in need of placement.

In addition to prohibiting discrimination in placements on the basis of race, color or national origin, the Act requires that agencies engage in diligent recruitment efforts to ensure that all children needing placement are served in a timely and adequate manner. The guidance sets forth a number of methods that agencies should utilize in order to develop an adequate pool of families capable of promoting each child's development and case goals.

Covered agencies or entities must be in full compliance with the Act no later than six months after publication of this guidance or one year after the date of the enactment of this Act, whichever

occurs first, i.e., October 21, 1995. Under limited circumstances outlined in the guidance, the Secretary of HHS may extend the compliance date for states able to demonstrate that they must amend state statutory law in order to change a particular practice that is inconsistent with the Act. The guidance explains in detail the vehicles for enforcement of the Act's prohibition against discrimination in adoption or foster care placement.

The text of the guidance appears below.

Dated: 4/20/95 Dennis Hayashi

Dennis Hayashi,

Director,

Office for Civil Rights

Dated: 4/28/95 Mary Jo Bane

Mary Jo Bane,

Assistant Secretary,

Administration for Children and Families

POLICY GUIDANCE

Race, Color, or National Origin As Considerations in Adoption and Foster Care Placements

BACKGROUND

On October 20,1994 President Clinton signed the "Improving America's Schools Act of 1994," Public Law 103-382, which includes among other provisions, Section 551, titled "The Multiethnic Placement Act of 1994" (MEPA).

The purposes of that Act are: to decrease the length of time that children wait to be adopted; to prevent discrimination in the placement of children on the basis of race, color, or national origin; and to facilitate the identification and recruitment of foster and adoptive parents who can meet children's needs.

To accomplish these goals the Act identifies specific impermissible activities by an agency or entity (agency) which receives Federal assistance and is involved in adoption or foster care placements. The law prohibits such agencies from "categorically denying to any person the opportunity to become an adoptive or foster parent solely on the basis of the race, color, or national origin of the adoptive or foster parent or the child" and "from delaying or denying the placement of a child solely on the basis of race, color, or national origin of the adoptive or foster parent or parents involved." Under the Act, these prohibitions also apply to the failure to seek termination of parental rights or otherwise make a child legally available for

adoption.

The law does permit an agency to consider, in determining whether a placement is in a child's best interests, "the child's cultural, ethnic, and racial background and the capacity of prospective foster or adoptive parents to meet the needs of a child of this background." If an agency chooses to include this factor among those to be considered in making placement decisions, it must be considered in conjunction with other factors relevant to the child's best interests and must not be used in a manner that delays the placement decision.

The Act also seeks to ensure that agencies engage in active recruitment of potential foster and adoptive parents who reflect the racial and ethnic diversity of the children needing placement. Section 554 of the Act amends Section 422(b) and Part A of Title XI of the Social Security Act. The amendment specifies the following requirements for child welfare services programs: "[Each plan for child welfare services under this part shall . . .] (9) provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed."

The Multiethnic Placement Act is to be viewed in conjunction with Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits recipients of Federal financial assistance from discriminating based on race, color, or national origin in their programs and activities and from operating their programs in ways that have the effect of discriminating on the basis of race, color,

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or national origin.

The Administration for Children and Families (ACF) and the Office for Civil Rights (OCR) in the Department of Health and Human Services (HHS) have the responsibility for implementing these laws. OCR has the responsibility to enforce compliance with Title VI and its implementing regulation (45 CFR Part 80), as well as other civil rights laws. ACF administers programs of Federal financial assistance to child welfare agencies and has responsibility to enforce compliance with the laws authorizing this assistance.

Private, as well as public, adoption and foster care agencies often receive Federal financial assistance, through State Block Grant programs, programs under Title IV-E of the Social Security Act, and discretionary grants. The assistance may reach an agency directly, or indirectly as a subrecipient of other agencies. Receipt of such assistance obligates recipients to comply with Title VI and other civil rights laws and regulations and with the requirements of the Social Security Act. Further, the Civil Rights Restoration Act of 1987 confers jurisdiction over entities any part of which receive any Federal funds.

This guidance is being issued jointly by ACF and OCR, pursuant to Section 553(a) of MEPA, to enable affected agencies to conform their laws, rules, and practices to the requirements of the Multiethnic Placement Act and Title VI.

DISCUSSION

A. Race, Culture, or Ethnicity As A Factor In Selecting Placements

1. Impermissible Activities

In enacting MEPA, Congress was concerned that many children, in particular those from minority groups, were spending lengthy periods of time in foster care awaiting placement in adoptive homes.[1] At present, there are over twenty thousand children who are legally free for adoption but who are not in preadoptive homes. While there is no definitive study indicating how long children who are adoptable must wait until placement, the available data indicate the average wait may be as long as two years after the time that a child is legally free for adoption, and that minority children spend, on average, twice as long as non-minority children before they are placed. Both the number of children needing placements and the length of time they await placement increase substantially when those children awaiting termination of parental rights are taken into account.

MEPA reflects Congress' judgment that children are harmed when placements are delayed for a period longer than is necessary to find qualified families. The legislation seeks to eliminate barriers that delay or prevent the placement of children into qualified homes. In particular, it focuses on the possibility that policies with respect to matching children with families of the same race, culture, or ethnicity may result in delaying, or even preventing, the adoption of children by qualified families. It also is designed to ensure that every effort is made to develop a

[1] MEPA applies to decisions regarding both foster care and adoption placements. In discussions regarding the bill, members of Congress focused primarily on problems related to adoption decisions.

large and diverse pool of potential foster and adoptive families, so that all children can be quickly placed in homes that meet their needs.

In developing this guidance, the Department recognizes that states seek to achieve a variety of goals when making foster or adoptive placements. For example, in making a foster care placement, agencies generally are concerned with finding a home that the child can easily fit into, that minimizes the number of adjustments that the child, already facing a difficult situation, must face, and that is capable of meeting any special physical, psychological, or educational needs of the child. In making adoption placements, agencies seek to find homes that will maximize the current and future well-being of the child. They evaluate whether the particular prospective parents are equipped to raise the child, both in terms of their capacity and interests to meet the individual needs of the particular child, and the capacity of the child to benefit from membership in a particular family.

Among the factors that many state statutes, regulations, or policy manuals now specify as being relevant to placement decisions are the racial, ethnic, and cultural background of the child. Some states specify an order of preference for placements, which make placement in a family of the same race, culture, or ethnicity as the child a preferred category. Some states prescribe set periods of time in which agencies must try to place a child with a family of the same race, culture, or ethnicity before the child can be placed with a family of a different race, culture, or ethnicity.

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Some states have a general preference for same race or ethnicity placements, although they do not specify a placement order or a search period. And some states indicate that children should be placed with families of the same race or ethnicity provided that this is consistent with the best interests of the child.

Establishing standards for making foster care and adoption placement decisions, and determining the factors that are relevant in deciding whether a particular placement meets the standards, generally are matters of state law and policy. Agencies which receive Federal assistance, however, may use race, culture, or ethnicity as factors in making placement decisions only insofar as the Constitution, MEPA, and Title VI permit.

In the context of child placement decisions, the United States Constitution and Title VI forbid decision making on the basis of race or ethnicity unless the consideration advances a compelling governmental interest. The only compelling governmental interest, in this context, is protecting the "best interests" of the child who is to be placed. Moreover, the consideration must be narrowly tailored to advancing the child's interests and must be made as an individualized determination for each child. An adoption agency may take race into account only if it has made an individualized determination that the facts and circumstances of the specific case require the consideration of race in order to advance the best interests of the specific child. Any placement policy that takes race or ethnicity into account is subject to strict scrutiny by the courts to determine whether it satisfies these tests. Palmore v.

Sidoti, 466 U.S. 429 (1984).

A number of practices currently followed by some agencies clearly violate MEPA or Title VI. These include statutes or policies that:

* establish time periods during which only a same race/ethnicity search will occur;
* establish orders of placement preferences based on race, culture, or ethnicity;
* require caseworkers to specially justify transracial placements; or
* otherwise have the effect of delaying placements, either before or after termination of parental rights, in order to find a family of a particular race, culture, or ethnicity.

Other rules, policies, or practices that do not meet the constitutional strict scrutiny test would also be illegal.

2. Permissible Considerations

MEPA does specifically allow, but not require, agencies to consider "the child's cultural, ethnic, and racial background and the capacity of prospective foster or adoptive parents to meet the needs of a child of this background" as one of the factors in determining whether a particular placement is in a child's best interests.

When an agency chooses to use this factor, it must be on an individualized basis. Agencies that provide professional adoption services usually involve prospective parents in an educative family assessment process designed to increase the likelihood of

successful placements. This process includes providing potential adoptive parents with an understanding of the special needs of adoptive children, such as how children react to separation and maltreatment and the significance of the biological family to a child. Adoption specialists also assess the strengths and weaknesses of prospective parents. They help them decide whether adoption is the right thing for them and identify the kind of child the family thinks it can parent. Approved families are profiled, as are the waiting children.

When a child becomes available for adoption, the pool of families is reviewed to see if there is an available family suitable for the specific child.[2] Where possible, a number of families are identified and the agency conducts a case conference to determine which family is most suitable. The goal is to find the family which has the greatest ability to meet the child's psychological needs.[3] The child is discussed with the family, and

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[2] Among the child-related factors often considered are:

- the child's current functioning and behaviors;
- the medical, educational and developmental needs of the child;
- the child's history and past experience;
- the child's cultural and racial identity needs;
- the child's interests and talents;
- the child's attachments to current caretakers.

[3] Among the factors that agencies consider in assessing a prospective parent's suitability to care for a particular child are:

- ability to form relationships and to bond with the specific child;
- the ability to help the child integrate into the family;
- the ability to accept the child's background and help the child cope with her or his past;

decisions are made about the placement of the specific child with the family. This process helps prevent unsuccessful placements, and promotes the interest of children in finding permanent homes.

To the extent that an agency looks at a child's race, ethnicity, or cultural background in making placement decisions, it must do so in a manner consistent with the mode of individualized decision-making that characterizes the general placement process for all children. Specifically, in recruiting placements for each child, the agency must focus on that child's particular needs and the capacities of the particular prospective parent(s).

In making individualized decisions, agencies may examine the capacity of the prospective parent(s) to meet the child's psychological needs that are related to the child's racial, ethnic, or cultural background. This may include assessing the attitudes of prospective parents that relate to their capacity to nurture a child of a particular background. Agencies are not prohibited from discussing with prospective adoptive and foster parents their feelings, capacities and preferences regarding caring for a child of a particular race or ethnicity, just as they discuss issues related to other characteristics, such as sex, age, or disability; nor are they prohibited from considering the expressed preference of the prospective parents as one of several factors in making

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- the ability to accept the behavior and personality of the specific child;
- the ability to validate the child's cultural, racial and ethnic background;
- the ability to meet the child's particular educational, developmental or psychological needs.

placement decisions.

Agencies may consider the ability of prospective parents to cope with the particular consequences of the child's developmental history and to promote the development of a positive sense of self, which often has been compromised by maltreatment and separations. An agency also may assess a family's ability to nurture, support, and reinforce the racial, ethnic, or cultural identity of the child and to help the child cope with any forms of discrimination the child may encounter. When an agency is making a choice among a pool of generally qualified families, it may consider whether a placement with one family is more likely to benefit a child, in the ways described above or in other ways that the agency considers relevant to the child's best interest.

Under the law, application of the "best interests" test would permit race or ethnicity to be taken into account in certain narrow situations. For example, for children who have lived in one racial, ethnic, or cultural community, the agency may assess the child's ability to make the transition to another community. A child may have a strong sense of identity with a particular racial, ethnic, or cultural community that should not be disrupted. This is not a universally applicable consideration. For instance, it is doubtful that infants or young children will have developed such needs. Ultimately, however, the determination must be individualized. Another example would be when a prospective parent has demonstrated an inability to care for, or nurture self-esteem in, a child of a different race or ethnicity. In making such determinations, an

adoption agency may not rely on generalizations about the identity needs of children of a particular race or ethnicity or on generalizations about the abilities of prospective parents of one race or ethnicity to care for, or nurture the sense of identity of, a child of another race, culture, or ethnicity. Nor may an agency presume from the race or ethnicity of the prospective parents that those parents would be unable to maintain the child's ties to another racial, ethnic, or cultural community.

B. Recruitment Efforts

As recognized in the Multiethnic Placement Act, in order to achieve timely and appropriate placement of all children, placement agencies need an adequate pool of families capable of promoting each child's development and case goals. This requires that each agency's recruitment process focuses on developing a pool of potential foster and adoptive parents willing and able to foster or adopt the children needing placement. The failure to conduct recruitment in a manner that seeks to provide all children with the opportunity for placement, and all qualified members of the community an opportunity to adopt, is inconsistent with the goals of MEPA and could create circumstances which would constitute a violation of Title VI.

An adequate recruitment process has a number of features. Recruitment efforts should be designed to provide to potential foster and adoptive parents throughout the community information about the characteristics and needs of the available children, the nature of the foster care and adoption processes, and the supports

available to foster and adoptive families.

Both general and targeted recruiting are important. Reaching all members of the community requires use of general media- radio, television, and print. In addition, information should be disseminated to targeted communities through community organizations, such as religious institutions and neighborhood centers. The dissemination of information is strengthened when agencies develop partnerships with groups from the communities from which children come, to help identify and support potential foster and adoptive families and to conduct activities which make the waiting children more visible.

To meet MEPA's diligent efforts requirements, an agency should have a comprehensive recruitment plan that includes:

* a description of the characteristics of waiting children;
* specific strategies to reach all parts of the community;
* diverse methods of disseminating both general and child specific information;
* strategies for assuring that all prospective parents have access to the home study process, including location and hours of services that facilitate access by all members of the community;
* strategies for training staff to work with diverse cultural, racial, and economic communities;
* strategies for dealing with linguistic barriers;
* non-discriminatory fee structures; and

- procedures for a timely search for prospective parents for a waiting child, including the use of exchanges and other interagency efforts, provided that such procedures must insure that placement of a child in an appropriate household is not delayed by the search for a same race or ethnic placement.

Agencies receiving Federal funds may not use standards related to income, age, education, family structure, and size or ownership of housing, which exclude groups of prospective parents on the basis of race, color, or national origin, where those standards are arbitrary or unnecessary or where less exclusionary standards are available.

ENFORCEMENT

As provided in Section 553(d)(1) of MEPA, covered agencies or entities are required to comply with the Act no later than six months after publication of this guidance or one year after the date of the enactment of this Act, whichever occurs first, i.e., October 21, 1995. Pursuant to Section 553(d)(2) of MEPA, if a state demonstrates to the satisfaction of the Secretary of HHS that it is necessary to amend state statutory law in order to change a particular practice that is inconsistent with MEPA, the Secretary may extend the compliance date for the state a reasonable number of days after the close of the first state legislative session beginning after April 25, 1995. In determining whether to extend the compliance date, the Secretary will take into account the constitutional standards described in Part A of this guidance.

Because states need not enforce unconstitutional provisions of their laws, statutory amendments are not an essential precondition to coming into compliance with respect to any such provisions.

HHS emphasizes voluntary compliance with the law and recognizes that covered agencies may want further guidance on their obligations under these laws. Accordingly, HHS is offering technical assistance to any covered agency seeking to better understand and more fully comply with the Multiethnic Placement Act. Organizations wishing to be provided with technical assistance on compliance with the nondiscrimination provisions of MEPA should contact Ronald Copeland of OCR at 202-619-0553. Organizations wishing to be provided with technical assistance regarding required recruitment efforts should contact Carol Williams or Dan Lewis of the Administration on Children and Families at 202-205-8618.

The Multiethnic Placement Act provides two vehicles for enforcement of its prohibition against discrimination in adoption or foster care placement. First, pursuant to Section 553(b), any individual who is aggrieved by an action he or she believes constitutes discrimination in violation of the Act has the right to bring an action seeking equitable relief in a United States district court of appropriate jurisdiction. Second, the Act provides that noncompliance with the prohibition is deemed a violation of Title VI.

OCR has published regulations to effectuate the provisions of Title VI. 45 CFR Part 80. Any individual may file a complaint

with OCR alleging that an adoption or foster care organization funded by HHS makes placement decisions in violation of the Multiethnic Placement Act and Title VI. OCR may also initiate compliance reviews to determine whether violations have occurred. If OCR determines that an adoption or foster care organization makes discriminatory placement decisions, OCR will first seek voluntary compliance with the law. Should attempts at voluntary compliance prove unsuccessful, OCR will take further steps to enforce the law.

These steps may involve referring the matter to the Department of Justice with a recommendation that appropriate court proceedings be brought. HHS may also initiate administrative proceedings leading to the termination of the offending agency's Federal financial assistance. These proceedings include the opportunity for a covered agency or entity to have a hearing on any OCR findings made against it. 45 CFR 80.8.

At any point in the complaint investigation process or during the pendency of fund termination proceedings, organizations may agree to come into voluntary compliance with the law. OCR will work closely with organizations to develop necessary remedial actions, such as training of staff in the requirements of Title VI and MEPA, to ensure that their efforts at compliance are successful.

When a state fails to develop an adequate recruitment plan and expedite the placement of children consistent with MEPA, the Secretary through ACF and OCR will provide technical assistance to

the state in the development of the plan and where necessary resolve through corrective action major compliance issues. When these efforts fail the Secretary will make a determination of appropriate proportional penalties.

HHS Guidance on the Interethnic Adoption Provisions

ACF Administration for Children and Families	U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES Administration on Children, Youth and Families	
	1. Log No. ACYF-IM-CB-97-04	2. Issuance Date: 06-05-97
	3. Originating Office: Children's Bureau	
	4. Key Words:	The Small Business Job Protection Act of 1996, Interethnic Adoption, and Multiethnic Placement Act

INFORMATION MEMORANDUM

TO: State Agencies Administering the Title IV-B Child and Family Services Program and the Title IV-E Foster Care and Adoption Assistance Programs

SUBJECT: GUIDANCE FOR FEDERAL LEGISLATION - The Small Business Job Protection Act of 1996 (Public Law (P.L.) 104-188), Section 1808, "Removal of Barriers to Interethnic Adoption"

LEGAL AND RELATED REFERENCES: The Small Business Job Protection Act of 1996 (Public Law 104-188); the Multiethnic Placement Act of 1994 (enacted as part of the Improving America's Schools Act, Public Law 103-382); the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Public Law 104-193); titles IV-B (42 U.S.C. 620 et seq.) and IV-E (42 U.S.C. 670 et seq.) of the Social Security Act; Section 471(a) of title IV-E (42 U.S.C. 671(a)); 45 C.F.R. 1356; and ACYF-IM-CB-96-24.

PURPOSE: The purpose of this Information Memorandum is to provide State agencies and others with guidance and clarification that relates to Section 1808, "Removal of Barriers to Interethnic Adoption," of the Small Business Job Protection Act.

BACKGROUND: On August 20, 1996 President Clinton signed The Small Business Job Protection Act of 1996. Included in this new law was Section 1808 "Removal of Barriers to Interethnic Adoption." On November 14, 1996 the Children's Bureau issued an Information Memorandum (IM), ACYF-IM-CB-96-24, to State title IV-E IV-B agencies informing them of the changes to the Multiethnic Placement Act (MEPA) of 1994 and the amendments to title IV-E.

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GUIDANCE: The Department issued a memorandum dated June 4, 1997 to the Office for Civil Rights (OCR) Regional Managers and the Administration for Children and Families (ACF) Regional Administrators to provide guidance in the implementation of MEPA as amended. Attached is the memorandum.

INQUIRIES: OCR and ACF Regional Office (lists attached)

James A. Harrell
Deputy Commissioner
Administration on Children, Youth and Families

cc: OCR and ACF Regional Office

Attachments:
A: June 4, 1997 Memorandum, SUBJECT: Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996 (without attachments)
B: Section 1808, "Removal of Barriers to Interethnic Adoption," of the Small Business Job Protection Act of 1996 (P.L. 104-188)
C: OCR and ACF Regional Office lists

DEPARTMENT OF HEALTH & HUMAN SERVICES

June 4, 1997

MEMORANDUM

TO : OCR Regional Managers
and
ACF Regional Administrators

FROM : Dennis Hayashi
Director, Office for Civil Rights
and
Olivia Golden
Principal Deputy Assistant Secretary
Administration for Children and Families

SUBJECT : Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996

On August 20, 1996, President Clinton signed the Small Business Job Protection Act of 1996. Section 1808 of the Act is entitled "Removal of Barriers to Interethnic Adoption." The section affirms and strengthens the prohibition against discrimination in adoption or foster care placements. It does this by adding to title IV-E of the Social Security Act a State Plan requirement and penalties which apply both to States and to adoption agencies. In addition, it repeals Section 553 of the Multiethnic Placement Act (MEPA), which has the effect of removing from the statute the language which read "Permissible Consideration -- An agency or entity [which receives federal assistance] may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of such background as one of a number of factors used to determine the best interests of a child."

Congress has now clarified its intent to completely eliminate delays in placement where they were in any way avoidable. Race, culture or ethnicity may not be used as the basis for any denial of placement, nor may such factors be used as a reason to delay any foster or adoptive placement.

The Interethnic Adoption provisions maintain a prohibition against delaying or denying the placement of a child for adoption or foster care on the basis of race, color, or national origin of the adoptive or foster parent, or the child involved. They further add a title IV-E State Plan requirement which also prohibits delaying and denying foster and adoptive placements on the basis of race, color or national origin.

The provisions also subject States and entities receiving Federal funding which are not in compliance with these title IV-E State plan requirements to specific graduated financial penalties (in cases in which a corrective action plan fails to cure the problem within six months). ACF staff and OCR staff are working to develop

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a common protocol for determining compliance with these Interethnic Adoption provisions, as well as policy and procedures for ACF to use in applying the title IV-E requirements, developing corrective action plans and imposing penalties.

As a first step in implementing the new title IV-E State Plan requirement and the associated penalties, ACF expects to amend certain of its child welfare reviews to screen for compliance with MEPA and the Interethnic provisions. ACF will begin preliminary documentation of MEPA compliance during fiscal year 1997, while completing the work on formal review standards and protocols, which will be published as proposed regulations. States which are determined to be out of compliance will be engaged in corrective action planning immediately. The penalties imposed by the statute are graduated, and vary according to the State population and the frequency and duration of noncompliance. The Department has estimated that State penalties could range from less than $1,000 to more than $3.6 million per quarter, and penalties for continued noncompliance could rise as high as $7 million to $10 million in some States.

The Office for Civil Rights will continue to receive and investigate complaints related to MEPA, and in addition will conduct independent reviews to test compliance within the States. The Administration for Children and Families will also conduct reviews which focus on or include tests of MEPA compliance. The two HHS agencies will use the common protocol and review standards in order to assure uniform application of the statute, and equitable and effective enforcement.

The Congress has retained section 554 of MEPA, which requires that child welfare services programs provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed. This is the section that requires States to include a provision for diligent recruitment in their title IV-B State Plans. The diligent recruitment requirement in no way mitigates the prohibition on denial or delay of placement based on race, color or national origin.

Set forth below is the language of the new provision. Key terms contained in MEPA that have been eliminated are shown, but struck.

> A person or government that is involved in adoption or foster care placements may not--(A) [~~categorically~~] deny to any individual the opportunity to become an adoptive or a foster parent, [~~solely~~] on the basis of the race, color, or national origin of the individual, or of the child involved; or (B) delay or deny the placement of a child for adoption or into foster care [~~or otherwise discriminate in making a placement decision, solely~~] on the basis of the race, color, or national origin of the

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adoptive or foster parent, or the child involved.

HHS civil rights and child welfare policies already prohibit delay or denial on the basis of race, color or national origin. Those policies have been developed according to a strict scrutiny standard, and are further supported by the language of the Interethnic Placement provisions. The effect of the elimination from the statute of the words "categorically," "solely," and "or otherwise discriminate in making a placement decision, solely" is to clarify that it is not just categorical bans against transracial placements that are prohibited. Rather, these changes clarify that even where a denial is not based on a categorical consideration, which is prohibited, other actions that delay or deny placements on the basis of race, color or national origin are prohibited.

The repeal of MEPA's "permissible consideration" confirms that the appropriate standard for evaluating the use of race, color or national origin in adoption and foster care placements is one of strict scrutiny. In enacting MEPA, Congress prohibited actions that violated the rigorous constitutional strict scrutiny standard. That standard is reflected in the provision establishing that a violation of MEPA is deemed a violation of Title VI. Title VI itself incorporates the strict scrutiny standard. The Department's published MEPA guidance stressed that standard, stating unequivocally that "rules, policies, or practices that do not meet the constitutional strict scrutiny test would . . . be illegal."

Notwithstanding that guidance, after passage of MEPA, some had argued that the permissible consideration language allowed States to routinely take race into account in making placement decisions. This Department had never taken that view because it would be inconsistent with a strict scrutiny standard. Congress' repeal of the permissible consideration language removes the basis for any argument that such a routine practice would be permissible and reinforces the HHS position. Elimination of that language, however, does not affect the imposition of the strict scrutiny standard. As it had under MEPA, Congress included a general nondiscrimination provision in the new law and connected violations of that provision to violations of Title VI. The changes made in the law strengthened it by removing areas of potential misinterpretation and strengthening enforcement while continuing to emphasize the importance of removing barriers to the placement of children. In that area, as noted below, "the best interests of the child" remains the operative standard in foster care and adoptive placements.

The Department's policy in this delicate area is guided by a number of complementary statutory provisions:

1) From the perspective of civil rights law, the strict scrutiny standard under Title VI, the Interethnic Adoption provisions and the U.S. Constitution forbid decision making on

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the basis of race or ethnicity except in the very limited circumstances where such consideration would be necessary to achieve a compelling governmental interest. The only compelling governmental interest related to child welfare that has been recognized by courts is protecting the "best interests" of the child who is to be placed. Additionally, the consideration must be narrowly tailored to advance the child's interests, and must be made as an individualized determination for each child.

2) From the standpoint of child welfare legislation, Public Law 96-272, the child welfare reform legislation passed in 1979, applied the "best interests of the child" standard to judicial determinations regarding removal of children into foster care as a condition of eligibility for federal financial participation under title IV-E of the Social Security Act (the Act). The best interests standard is a common provision of State laws regarding child welfare and domestic matters. Title IV-B of the Act requires States to act in the best interests of children, and, in their State Child and Family Services Plans to "provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed." In addition to providing for determinations regarding the best interests of the child, State Plans under title IV-E of the Act are required to provide "that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards."

Consistent with the intent of the new law and the constitutional standard, it would be inappropriate to try to use the constitutional standard as a means to routinely consider race and ethnicity as part of the placement process. Any decision to consider the use of race as a necessary element of a placement decision must be based on concerns arising out of the circumstances of the individual case. For example, it is conceivable that an older child or adolescent might express an unwillingness to be placed with a family of a particular race. In some states older children and adolescents must consent to their adoption by a particular family. In such an individual situation, an agency is not required to dismiss the child's express unwillingness to consent in evaluating placements. While the adoption worker might wish to counsel the child, the child's ideas of what would make her or him most comfortable should not be dismissed, and the worker should consider the child's willingness to accept the family as an element that is critical to the success of the adoptive placement. At the same time, the worker should not dismiss as possible placements families of a particular race who are able to meet the needs of the child.

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Other circumstances in which race or ethnicity can be taken into account in a placement decision may also be encountered. However it is not possible to delineate them all. The strict scrutiny standard exists in part because the law cannot anticipate in advance every factual situation which may present itself. However, the primary message of the strict scrutiny standard in this context is that only the most compelling reasons may serve to justify consideration of race and ethnicity as part of a placement decision. Such reasons are likely to emerge only in unique and individual circumstances. Accordingly, occasions where race or ethnicity lawfully may be considered in a placement decision will be correspondingly rare.

ACF has issued an Information Memorandum (ACYF-IM-CB-96-24, dated November 14, 1996, attached) which provided the States with basic information about the Interethnic Adoption provisions and about other legislative changes which directly affect adoptive and foster placements, including the new requirement in title IV-E that States shall consider relatives as a placement preference for children in the child welfare system.

Much has already been accomplished through our joint efforts to implement MEPA. These efforts to date have focused on the importance of four critical elements:

1) Delays in placing children who need adoptive or foster homes are not to be tolerated, nor are denials based on any prohibited or otherwise inappropriate consideration;

2) Discrimination is not to be tolerated, whether it is directed toward adults who wish to serve as foster or adoptive parents, toward children who need safe and appropriate homes, or toward communities or populations which may heretofore have been under-utilized as a resource for placing children;

3) Active, diligent, and lawful recruitment of potential foster and adoptive parents of all backgrounds is both a legal requirement and an important tool for meeting the demands of good practice; and

4) The operative standard in foster care or adoptive placements has been and continues to be "the best interests of the child." Nevertheless, as noted above, any consideration of race, color or national origin in foster or adoptive placements must be narrowly tailored to advance the child's best interests and must be made as an individualized determination of each child's needs and in light of a specific prospective adoptive or foster care parent's capacity to care for that child.

Protection of activities associated with adoption and foster care from discriminatory practices is a major priority for HHS.

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Questions regarding this memorandum should be directed to Kathleen O'Brien in the Office for Civil Rights at (202) 619-0403 or Michael Ambrose in the Children's Bureau at (202) 205-8740.

Attachment

HHS Clarification of Placement Practice Issues

ACF Administration for Children and Families	U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES Administration on Children, Youth and Families	
	1. Log No: ACYF-IM-CB-98-03	**2. Issuance Date:** 5-11-98
	3. Originating Office: Children's Bureau	
	4. Key Words: The Small Business Job Protection Act of 1996, Multiethnic Placement Act, Interethnic Adoption Provisions	

INFORMATION MEMORANDUM

TO	State and Territorial Agencies Administering Title IV-B and Title IV-E of the Social Security Act
SUBJECT	INFORMATION ON IMPLEMENTATION OF FEDERAL LEGISLATION - Questions and answers that clarify the practice and implementation of section 471(a)(18) of title IV-E of the Social Security Act
LEGAL AND RELATED REFERENCES	The Small Business Job Protection Act of 1996 (Public Law (P.L.) 104-188), the Howard M. Metzenbaum Multiethnic Placement Act of 1994 (P.L. 103-382), and Titles IV-B (42 U.S.C. 620 et seq.) and IV-E (42 U.S.C. 670 et seq.) of the Social Security Act (the Act)
PURPOSE	The General Accounting Office (GAO) is conducting a study on States' implementation of the Interethnic provision of the Small Business Job Protection Act of 1996 and raised several questions. The purpose of this memorandum is to inform States, Tribes and private child placement agencies of the responses to these questions
BACKGROUND	On August 20, 1996 President Clinton signed the Small Business Job Protection Act of 1996. Included in this new law was Section 1808, "Removal of Barriers to Interethnic Adoption," which repealed section 553 of MEPA and amended title IV-E of the Act by adding a State plan requirement at section 471(a)(18). On June 5, 1997 the Children's Bureau issued an Information Memorandum (ACFY-IM-CB-97-04) to State title IV-B/IV-E agencies and others providing them with guidance and clarification on Section 1808

INFORMATION The attached document, "GAO Questions and Answers," addresses a number of implementation and practice issues that States, Tribes, private child placement agencies and others may find helpful in achieving compliance with title IV-E of the Social Security Act

INQUIRIES Office for Civil Rights (OCR) and Administration for Children and Families (ACF) Regional Offices (lists attached)

James A Harrell
Deputy Commissioner
Administration on Children, Youth and Families

cc OCR and ACF Regional Offices

Attachments "GAO Question and Answers"
OCR and ACF Regional Office Lists

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ACYF-IM-CB-98-xx

Answers to GAO QUESTIONS Regarding the Multiethnic Placement Act, as Amended

1. **May public agencies allow foster parents to specify the race, color, national origin, ethnicity or culture of children for whom they are willing to provide care?**

2. **May public agencies allow adoptive parents to specify the race, color, national origin, ethnicity or culture of children of whom they are willing to adopt?**

A: In making decisions about placing a child, whether in an adoptive or foster setting, a public agency must be guided by considerations of what is in the best interests of the child in question. The public agency must also ensure that its decisions comply with statutory requirements. Where it comes to the attention of a public agency that particular prospective parents have attitudes that relate to their capacity to nurture a particular child, the agency may take those attitudes into consideration in determining whether a placement with that family would be in the best interests of the child in question.

The consideration of the ability of prospective parents to meet the needs of a particular child should take place in the framework of the general placement decision, in which the strengths and weaknesses of prospective parents to meet all of a child's needs are weighed so as to provide for the child's best interests, and prospective parents are provided the information they need realistically to assess their capacity to parent a particular child.

An important element of good social work practice in this process is the individualized assessment of a prospective parent's ability to serve as a foster or adoptive parent. This assessment can include an exploration of the kind of child with whom a prospective parent might comfortably form an attachment. It is appropriate in the context of good practice to allow a family to explore its limitations and consider frankly what conditions (for example, disabilities in children, the number of children in a sibling group, or children of certain ages) family members would be able or willing to accept. The function of assessing the needs and limitations of specific prospective foster or adoptive parents in order to determine the most appropriate placement considering the various individual needs of a particular child is an essential element of social work practice, and critical to an agency's ability to achieve the best interests of that child. The assessment function is also critical, especially in adoptive placements, to minimizing the risk that placements might later disrupt or dissolve.

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The assessment function must not be misused as a generalized racial or ethnic screen; the assessment function cannot routinely include considerations of race or ethnicity.

The Department generally does not distinguish between foster and adoptive settings in terms of an agency's consideration of the attitudes of prospective parents. However, it is possible that a public agency may attach different significance in assessing the best interests of a child in need of short term or emergency placement.

As noted in the Department's original guidance on MEPA, agencies are not prohibited from discussing with prospective adoptive and foster parents their feelings, capacities and preferences regarding caring for a child of a particular race or ethnicity, just as they discuss other individualized issues related to the child. However, as the Department has emphasized, any consideration of race or ethnicity must be done in the context of individualized placement decisions. An agency may not rely on generalizations about the needs of children of a particular race or ethnicity, or on generalizations about the abilities of prospective parents of one race or ethnicity to care for a child of another race or ethnicity.

3. **May public agencies assess the racial, national origin, ethnic and/or cultural needs of all children in foster care, either by assessing those needs directly or as part of another assessment such as an assessment of special needs?**

A: Public agencies may not routinely consider race, national origin and ethnicity in making placement decisions. Any consideration of these factors must be done on an individualized basis where special circumstances indicate that their consideration is warranted. A practice of assessing all children for their needs in this area would be inconsistent with an approach of individually considering these factors only when specific circumstances indicate that it is warranted.

Assessment of the needs of children in foster care, and of any special needs they may have that could help to determine the most appropriate placement for a child, is an essential element of social work practice for children in out-of-home care, and critical to an agency's ability to achieve the best interests of the child.

Section 1808 of Public Law 104-188 by its terms addresses only race, color, or national origin, and does not address the consideration of culture in placement decisions. There are situations where cultural needs may be important in

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placement decisions, such as where a child has specific language needs. However, a public agency's consideration of culture would raise Section 1808 issues if the agency used culture as a proxy for race, color or national origin. Thus, while nothing in Section 1808 directly prohibits a public agency from assessing the cultural needs of all children in foster care, Section 1808 would prohibit an agency from using routine cultural assessments in a manner that would circumvent the law's prohibition against the routine consideration of race, color or national origin.

4. **If no to question 3, may they do this for a subset of all children in foster care?**

A: As noted above, Section 1808 prohibits the routine consideration of race. It permits the consideration of race on an individualized basis where circumstances indicate that it is warranted. The question suggests that assessment of race, color, or national origin needs would not be done for all children in foster care, but for a subset. If the subset is derived by some routine means other than where specific individual circumstances suggest that it is warranted, the same considerations discussed above would apply.

5. **May public agencies assess the racial, national origin, ethnic and/or cultural capacity of all foster parents, either by assessing that capacity directly or as part of another assessment such as an assessment of strengths and weaknesses?**

A: No. Race, color and national origin may not routinely be considered in assessing the capacity of particular prospective foster parents to care for specific children. However, assessment by an agency of the capacity of particular adults to serve as foster parents for specific children is at the heart of the placement process, and essential to determining what would be in the best interests of a particular child.

6. **If yes to question 5, may public agencies decline to transracially place any child with a foster parent who has unsatisfactory cultural competency skills?**

A: Not applicable; the answer to question 5 is no.

7. **If no to question 5, may public agencies decline to transracially place a child who has documented racial, national origin, ethnic and/or cultural needs with a foster parent who has unsatisfactory cultural competency skills?**

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A: As noted in the answer to questions No. 1 and 2 above, good practice requires an assessment of the capacity of potential foster parents to accommodate all the needs of a particular child. It is conceivable that in a particular instance race, color or national origin would be a necessary consideration to achieve the best interests of the child. However, any placement decision must take place in a framework that assesses the strengths and weaknesses of prospective parents to meet all of a child's needs so as to provide for the child's best interests. As noted in the answer to Questions 1 and 2, prospective parents should be offered, typically through training provided by an agency, information sufficient to confirm or broaden their understanding of what types of children they might most appropriately provide a home for.

8. **May public agencies honor the request of birth parents to place their child, who was involuntarily removed, with foster parents of a specific racial, national origin, ethnic and/or cultural group?**

A: No.

9. **Would the response to question 8 be different if the child was voluntarily removed?**

A: No.

10. **If an action by a public agency will not delay or deny the placement of a child, may that agency use race to differentiate between otherwise acceptable foster placements?**

A: No.

11. **May public agencies assess the racial, national origin, ethnic and/or cultural capacity of all adoptive parents, either by assessing that capacity directly or as part of another assessment such as an assessment of strengths and weaknesses?**

A: No. The factors discussed above concerning the routine assessment of race, color, or national origin needs of children would also apply to the routine assessment of the racial, national origin or ethnic capacity of all foster or adoptive parents.

12. **If yes to question 11, may public agencies decline to transracially place any child with an adoptive parent who has unsatisfactory cultural competency skills?**

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A: As noted in the answer to questions No. 1 and 2 above, good practice requires an assessment of the capacity of potential foster parents to accommodate all the needs of a particular child. It is conceivable that in a particular instance race, color or national origin would be a necessary consideration to achieve the best interests of the child. However, any placement decision must take place in a framework that assesses the strengths and weaknesses of prospective parents to meet all of a child's needs so as to provide for the child's best interests.

13. If no to question 11, may public agencies decline to transracially place a child who has documented racial, national origin, ethnic and/or cultural needs with an adoptive parent who has unsatisfactory cultural competency skills?

A: As noted in the answer to questions No. 1 and 2 above, good practice requires an assessment of the capacity of potential foster parents to accommodate all the needs of a particular child. It is conceivable that in a particular instance race, color or national origin would be a necessary consideration to achieve the best interests of the child. However, any placement decision must take place in a framework that assesses the strengths and weaknesses of prospective parents to meet all of a child's needs so as to provide for the child's best interests. As noted in the answer to Questions 1 and 2, prospective parents should be offered, typically through training provided by an agency, information sufficient to confirm or broaden their understanding of what types of children they might most appropriately provide a home for.

14. If no to question 11, how can public agencies assure themselves that they have identified an appropriate placement for a child for whom racial, national origin, ethnic and/or cultural needs have been documented?

A: Adoption agencies must consider all factors that may contribute to a good placement decision for a child, and that may affect whether a particular placement is in the best interests of the child. Such agencies may assure themselves of the fitness of their work in a number of ways, including case review conferences with supervisors, peer reviews, judicial oversight, and quality control measures employed by State agencies and licensing authorities. In some instances it is conceivable that, for a particular child, race, color or national origin would be such a factor. Permanency being the sine qua non of adoptive placements, monitoring the rates of disruption or dissolution of adoptions would also be appropriate. Where

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it has been established that considerations of race, color or national origin are necessary to achieve the best interests of a child, such factor(s) should be included in the agency's decision-making, and would appropriately be included in reviews and quality control measures such as those described above.

15. **May public agencies honor the request of birth parents to place their child, who was involuntarily removed, with adoptive parents of a specific racial, ethnic and/or cultural group?**

A: No.

16. **Would the response to question 15 be different if the child was voluntarily removed?**

A: No.

17. **If an action by a public agency will not delay or deny the placement of a child, may that agency use race to differentiate between otherwise acceptable adoptive parents?**

A: No.

18. **May a home finding agency that contracts with a public agency, but that does not place children, recommend only homes that match the race of the foster or adoptive parent to that of a child in need of placement?**

A: No. A public agency may contract with a home finding agency to assist with overall recruitment efforts. Some home finding agencies may be used because of their special knowledge and/or understanding of a specific community and may even be included in a public agency's targeted recruitment efforts. Targeted recruitment cannot be the only vehicle used by a State to identify families for children in care, or any subset of children in care, e.g., older or minority children. Additionally, a home finding agency must consider and include any interested person who responds to its recruitment efforts.

19. **May a home finding agency that contracts with a public agency, but that does not place children, dissuade or otherwise counsel a potential foster or adoptive parent who has unsatisfactory cultural competency skills to withdraw an application or not pursue foster parenting or adoption?**

A: No. No adoptive or foster placement may be denied or delayed based on the race of the prospective foster or adoptive parent or based on the race of the child.

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Dissuading or otherwise counseling a potential foster or adoptive parent to withdraw an application or not pursue foster parenting or adoption strictly on the basis of race, color or national origin would be a prohibited delay or denial.

The term "cultural competency," as we understand it, is not one that would fit in a discussion of adoption and foster placement. However, agencies should, as a matter of good social work practice, examine all the factors that may bear on determining whether a particular placement is in the best interests of a particular child. That may in rare instances involve consideration of the abilities of prospective parents of one race or ethnicity to care for a child of another race or ethnicity.

20. **May a home finding agency that contracts with a public agency, but that does not place children, assess the racial, national origin, ethnic and/or cultural capacity of all adoptive parents, either by assessing that capacity directly or as part of another assessment such as an assessment of strengths and weaknesses?**

A: No. There should be no routine consideration of race, color or national origin in any part of the adoption process. Any assessment of an individual's capacity to be a good parent for any child should be made on an individualized basis by the child's caseworker and not by a home finding agency. Placement decisions should be guided by the child's best interest. That requires an individualized assessment of the child's total needs and an assessment of a potential adoptive parent's ability to meet the child's needs.

21. **If no to question 20, may they do this for a subset of adoptive parents, such as white parents?**

A: No.

22. **If a black child is placed with a couple, one of whom is white and one of whom is black, is this placement classified as inracial or transracial?**

23. **If a biracial black/white child is placed with a white couple, is this placement classified as inracial or transracial?**

24. **Would the response to question 22 be different if the couple were black?**

A: The statute applies to considerations of race, color or national origin in placements for adoption and foster care.

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The Department's Adoption and Foster Care Analysis and Reporting System (AFCARS) collects data on the race of the child and the race of adoptive and foster parents, as required by regulation at 45 CFR 1355, Appendix A. AFCARS uses racial categories defined by the United States Department of Commerce, Bureau of the Census. The Department of Commerce does not include "biracial" among its race categories; therefore no child would be so classified for AFCARS purposes. The Department of Health and Human Services does not classify placements as being "inracial" or "transracial."

25. **How does HHS define "culture" in the context of MEPA guidance?**

A: HHS does not define culture. Section 1808 addresses only race, color, or national origin, and does not directly address the consideration of culture in placement decisions. A public agency is not prohibited from the nondiscriminatory consideration of culture in making placement decisions. However, a public agency's consideration of culture must comply with Section 1808 in that it may not use culture as a replacement for the prohibited consideration of race, color or national origin.

26. **Provide examples of what is meant by delay and denial of placement in foster care, excluding situations involving adoption.**

A: Following are some examples of delay or denial in foster care placements:

1. A white newborn baby's foster placement is delayed because the social worker is unable to find a white foster home; the infant is kept in the hospital longer than would otherwise be necessary and is ultimately placed in a group home rather than being placed in a foster home with a minority family.

2. A minority relative with guardianship over four black children expressly requests that the children be allowed to remain in the care of a white neighbor in whose care the children are left. The state agency denies the white neighbor a restricted foster care license which will enable her to care for the children. The agency's license denial is based on its decision that the best interests of the children require a same-race placement, which will delay the permanent foster care placement. There was no individualized assessment or evaluation indicating that a same-race placement is actually in the best interests of the children.

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3. Six minority children require foster placement, preferably in a family foster home. Only one minority foster home is available; it is only licensed to care for two children. The children remain in emergency shelter until the agency can recertify and license the home to care for the six children. The children remain in an emergency shelter even though a white foster home with capacity and a license to care for six children is available.

4. Different standards may be applied in licensing white versus minority households resulting in delay or denial of the opportunity to be foster parents.

5. Foster parent applicants are discouraged from applying because they are informed that waiting children are of a different race.

6. There are placement delays and denials when states or agencies expend time seeking to honor the requests of biological parents that foster parents be of the same race as the child.

Comments From the Department of Health and Human Services

DEPARTMENT OF HEALTH & HUMAN SERVICES — Office of Inspector General

Washington, D.C. 20201

AUG 13 1998

Mr. Mark V. Nadel
Associate Director,
Income Security Issues
United States General
Accounting Office
Washington, D.C. 20548

Dear Mr. Nadel:

Enclosed are the Department's comments on your draft report, "Foster Care: Implementation of the Multiethnic Placement Act Poses Difficult Challenges." The comments represent the tentative position of the Department and are subject to reevaluation when the final version of this report is received.

The Department appreciates the opportunity to comment on this draft report before its publication.

Sincerely,

June Gibbs Brown
Inspector General

Enclosure

The Office of Inspector General (OIG) is transmitting the Department's response to this draft report in our capacity as the Department's designated focal point and coordinator for General Accounting Office reports. The OIG has not conducted an independent assessment of these comments and therefore expresses no opinion on them.

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COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ON THE U.S. GENERAL ACCOUNTING OFFICE'S DRAFT REPORT, FOSTER CARE: IMPLEMENTATION OF THE MULTIETHNIC PLACEMENT ACT POSES DIFFICULT CHALLENGES (GAO/HEHS-98-204)

General Comments

The Department appreciates the opportunity to comment on the General Accounting Office's (GAO's) draft report, which documents both the complexity of the issues associated with implementing the Multiethnic Placement Act of 1994 (MEPA) and the scope and intensity of the Department's actions. In addition to the challenges noted in the draft report, the complex process of changing practice, at the levels both of public and private agencies and of individual workers, is an expectation that goes well beyond what the Department is usually called upon to do. The Department is making a serious effort to respond to this unprecedented expectation by: providing guidance and technical assistance; awarding discretionary grants to test new practices and techniques; making the Children's Bureau's Resource Centers available to the States and others; and sending employees of the Department's Office for Civil Rights (OCR) and Administration for Children and Families (ACF) into the field to meet with State officials and practitioners, to speak at conferences, and to make presentations at training sessions. These actions are in support of the successes the Department has already achieved in assuring compliance with MEPA in State law, regulation and policy. In addition, the Department continues to respond to needs for policy clarification as such needs are identified, to investigate complaints, and to review State and local compliance with MEPA and the Interethnic Placement provisions of 1996 (MEPA\IPA).

The following comments respond to and expand on two key areas explored in the draft report, involving training and technical assistance in support of MEPA\IPA implementation, and monitoring for compliance, including the use of existing data bases for this purpose.

Training and Technical Assistance

Following the passage of the Interethnic Placement provisions, the Department again initiated a heightened technical assistance and outreach program, mirroring the immediate and comprehensive outreach effort that had followed the passage of MEPA. When MEPA was enacted the Department was aware that the legal, practice and culture changes that the law required would be met with concern and even resistance by some in the field. For example, many States had by statute or regulation established waiting periods

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during which case workers were required to find a family whose race "matched" that of the child; such practices often resulted in delayed placement of minority children.

As the draft report notes, the Department's response to the passage of MEPA was immediate; we had analyzed State laws and policies and were in the field meeting with States within a very few months. The Department disagrees with the draft report's characterization of the response to the Interethnic Placement provisions as "slow." Because the basic issues of State law and policies had already been dealt with, some of the most visible efforts associated with MEPA implementation were not required for implementing the new provisions. The many activities underway to implement MEPA served also, to a large degree, to implement the Interethnic Placement provisions. Because the vigorous MEPA implementation efforts were continuing, and because the Department viewed the Interethnic Placement provisions as confirming our interpretation of MEPA, much of what was required to implement the IPA was already in place.

However, the Department was also aware of the significant effect of the Interethnic Placement provisions, which underscored the importance of the requirements of MEPA. The practical effect on the practices of State agencies was not as dramatic as under MEPA, since States had already begun the changes under MEPA. Likewise, the technical assistance and outreach work with State agencies which OCR and ACF had begun under MEPA was ongoing and already functioning well. In addition, OCR and ACF had forged an effective and strong partnership during the implementation of MEPA, which facilitated the implementation of the Interethnic Placement provisions. The extraordinary efforts within the Department to coordinate MEPA\IPA implementation through two separate agencies, each of which brings a unique perspective to this work, also provided a mechanism for quickly resolving questions or differences so that States would have a single, reliable Department policy to guide their implementation and compliance.

ACF and OCR issued joint guidance to all States on the implementation of the Interethnic Placement provisions on June 4, 1997. Regional offices have worked closely with States on the implementation of the Interethnic Placement provisions. The staff of all regional offices were briefed on the guidance and its implementation. In the Boston Region, a joint letter signed by the OCR Regional Manager and the Regional ACF Administrator was sent to administrators of the child welfare programs in each New England State. In the letter, OCR and ACF offered to meet with State agency staff to discuss the new Interethnic Placement provisions and Title VI of the Civil Rights Act and provide technical assistance

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OCR and ACF provided joint training to State agencies as well as OCR and ACF staff on the Interethnic Placement provisions. As an example of the types of training the Department has provided, in Boston, OCR and ACF regional staff presented a workshop at the 25th annual New England Adoption Conference sponsored by the Open Door Society of Massachusetts, Inc. Over 1500 adoptive parents, prospective adoptive parents, birth parents, foster parents, social workers and agency professionals attended the conference.

OCR and ACF staff throughout the country made presentations at State and advocacy group sponsored conferences. In addition, ACF made the Children's Bureau's National Resource Centers available to States to support State implementation efforts. The Resource Centers most directly involved in the training and technical assistance efforts include the National Resource Center on Legal and Court Issues, the National Resource Center for Special Needs Adoption, and the National Resource Center for Permanency Planning. In addition, training funds are available to States at a 75 percent Federal match rate, cost-allocated, under title IV-E of the Social Security Act, and States have been urged to make use of this entitlement funding for training staff and foster and adoptive parents. In early Fall, the Department will publish the next revision of the technical assistance document being produced under a grant to the American Bar Association, entitled *A Guide to the Multiethnic Placement Act of 1994 As Amended by the Interethnic Adoption Provisions of 1996*.

Compliance Monitoring

Over the past 3 years, the Department has significantly revised its child welfare monitoring protocol by shifting to an outcome-oriented approach in reviewing State child welfare operations. Over this period, a number of pilot reviews have been conducted to test this new methodology. The requirements of MEPA and the Interethnic Placement provisions were incorporated into child welfare monitoring in the context of these Child and Family Services (CFS) reviews. One key component of these reviews is a self-assessment conducted by a State agency in conjunction with an ACF regional office prior to an on-site assessment. The intent of the CFS reviews is to identify systems issues, rather than case-specific issues, that will then be examined more closely through a case record review and interviews with key stakeholders. Once any potential noncompliance with MEPA\IPA is identified as a result of this review, ACF staff will notify OCR of its findings for further investigation.

During the self-assessment stage of a review, State-specific data from existing information systems, such as the National Child Abuse and Neglect Data System (NCANDS) and the Adoption and Foster Care Analysis and Reporting System (AFCARS) for the most recent reporting period are transmitted to a State by ACF for a

State's review and analysis. These data are intended to assist the State in flagging problem areas that will then be the focus of a subsequent on-site review at the State level. While AFCARS and NCANDS may not provide the exact data that would meet an expressed need (for example, the determination of placement patterns related to race), their potential to identify trends can serve as a basis for further investigation which may result in a much closer examination of a State's foster care or adoption system.

A Notice of Proposed Rulemaking (NPRM) is expected to be published in the *Federal Register* in October 1998. This NPRM more fully describes the monitoring and review processes the Department is proposing to implement with regard to title IV-B and title IV-E programs, including MEPA and the Interethnic Placement provisions.

GAO's draft report considers whether AFCARS data might be used to test for compliance with MEPA\IPA, in a more direct manner than that described for the assessment phase of CFS reviews, above. AFCARS was not designed for monitoring purposes; it was designed to track children's cases through the system and provide policy-relevant information.

For a number of reasons, AFCARS has limited utility for use in tracking State compliance with MEPA\IPA. For example, AFCARS cannot explain why children experience differential results. It cannot explain why a specific child waits a certain amount of time for a finalized adoption, or whether or not there were potential parents who wanted to adopt a particular child and were denied the opportunity to do so. Also, AFCARS' racial categories currently do not permit identification of bi-racial children, or bi-racial birth parents or foster or adoptive parents. This distorts the information on the extent of same *versus* trans-racial adoptions and foster care placements. Finally, although national trends in foster care and adoption can be identified with AFCARS data, the role any particular initiative (for example, Adoption 2002) or statute (such as MEPA\IPA) plays cannot be isolated with these data.

OCR continues to investigate complaints and conduct civil rights compliance reviews, and OCR and ACF continue to visit States to oversee or assist in MEPA\IPA implementation. OCR and ACF efforts with States and State agencies have successfully maintained States' compliance with MEPA as amended. For example, OCR provided extensive technical assistance to the State agency in Minnesota which resulted in a change in the State's law to comply with the Interethnic Placement provisions. In Illinois, OCR and ACF met with State officials to secure the State's agreement to remove references to a child's cultural, ethnic and racial background and adoptive parents' racial and ethnic

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heritage from legislation addressing placement decisions. A bill assuring full compliance with MEPA\IPA was signed by Governor Edgar on June 30, 1998. OCR is continuing its review of States' statutes, regulations, policies and procedures to ensure full compliance with MEPA and the Interethnic Placement provisions.

Technical Comments

Page 8, lines 11-14 In the final sentence of the paragraph discussing the title IV-E penalty, the language is correct, because it describes who is subject to the penalty, but it could give the appearance of describing too broadly the base to which the penalty applies. Please revise the sentence to read "Funds which cause a recipient to be subject to the penalty under title IV-E include, but are not limited to, foster care funds for programs under Title IV-E of the Social Security Act, block grant funds, and discretionary grants, but only Title IV-E funds are taken into account in calculating the amount of any penalty."

Page 11, lines 2-4 While technically correct in context, the sentence could be misread to mean that GAO believes MEPA does not apply to children in kinship placement.

Page 18, line 7 "statutes," not "statues"

Page 22, last sentence The Department suggests alternative language so that the new text would read: "Furthermore, although officials from the Office for Civil Rights have provided training to state officials and continue to be available to conduct training, OCR officials are not trained as social workers. Therefore, these state officials do not consider Office for Civil Rights officials the appropriate source for practice-specific guidance, despite their expertise in the required standards for compliance with the amended Act. As a result, state officials are hesitant to request practice-specific guidance from the Office for Civil Rights."

Page 24, line 14 "Office for Civil Rights"

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In addition to those named above, Patricia Elston led the federal fieldwork and coauthored the draft, and Anndrea Ewertsen led the California fieldwork and coauthored the draft.

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